

ADMINISTRATIVE APPEAL DECISION

MS. ALICE McCAUSLIN; FILE NO. 2006-01122(0)

BUFFALO DISTRICT

MAY 3, 2007

Review Officer: Michael G. Montone, U.S. Army Corps of Engineers, Great Lakes and Ohio River Division

Appellant: Ms. Alice McCauslin

Authority: Section 404 of the Clean Water Act (33 U.S.C. 1344)

Date Request for Appeal received: August 18, 2006

Appeal Meeting and Site Visit Date: None

Background Information: In April 2006, a realtor acting on behalf of Mrs. McCauslin (the property owner and appellant) submitted preliminary information regarding her property to the Buffalo District. The property in question is approximately one acre in area, located at subplot 237/238 Boston Mills Road, in Hudson Township, Summit County, Ohio.

The initial information included digital pictures recorded at the site by a realtor, two site location maps, a legal description of the property, an addendum to a purchase agreement that requested a wetland report be completed, and a preliminary wetlands delineation report completed by an environmental consultant. The report contained a wetland delineation map identifying 0.4 acres of wetlands, but did not include the data forms upon which the map was based, or a site description.

The District contacted the appellant and her realtor multiple times between April and May 2006. According to District notes documenting these conversations, the District acknowledged the pending decision in the cases JOHN A. RAPANOS, ET UX., Petitioners v. UNITED STATES; and JUNE CARABELL, ET AL., Petitioners v. UNITED STATES ARMY CORPS OF ENGINEERS, ET AL. ("Rapanos and Carabell") which were argued before the U.S. Supreme Court on February 21, 2006 and advised the appellant that any decision by the Court and subsequent agency guidance may impact their jurisdictional determination. The District also agreed to perform a site inspection for the purpose of verifying the wetland delineation map.

In preparation for the site inspection, the District collected map resources and reviewed documented soil conditions, topography, indicators of wetlands, and aerial photography for the site. The District then conducted a site visit on June 19, 2006. In its site notes, the District reported that substantial rainfall was received by the area during the previous day and evening. The District described the property in the following manner:

The middle of the western portion of the site is generally wooded, and the north and northeast areas are mainly open areas (approximately a third of the acreage). The topography slopes generally down towards the south (Boston Mills Road) and west. A well-defined roadside ditch parallels Boston Mills Road on the north side, entering the site from the east, flowing west, and exiting the site via a 12-inch diameter plastic culvert. This ditch varies in width from 12-16 inches, is more than 12 inches deep, and was carrying substantial flow at the time of our visit.

Almost all of the southern third of the site consists of marshy terrain with cattails, Phragmites, rushes, and sedges, with mainly cattails along the southwestern boundary. Standing water and saturated soils were observed. As the land rises toward the north, the subplot vegetation transitions to scrub-shrub. An approximately 2-foot wide (at the southern end) ditch originates near the eastern property line in the wetland and continues southwest to the roadside ditch, essentially paralleling the east property line. Shallow water was flowing in this ditch at the time of our site visit. This ditch does not appear to have been constructed recently, and it appears that the ditch was excavated in an attempt to drain the site.

The District acknowledged that routine wetland delineation data sheets were not provided with the wetland delineation map. However, based on its site visit, the District concluded that the delineation map appeared accurate.

Also on June 19, 2006, the U.S. Supreme Court published its decision for the Rapanos and Carabell cases. *Rapanos v. United States*, ___ U.S. ___, 126 S.Ct. 2208, (2006) ("Rapanos").

On June 28, 2006, the District issued an approved jurisdictional determination (JD) to Mrs. McCauslin based on the information submitted by the appellant and its own site inspection. The District determined the presence of waters of the U.S. by verifying the accuracy of the wetland delineation map submitted by the appellant's representatives. The District further stated that the wetlands are part of a surface water tributary system to a navigable water of the U.S.

The appellant disagrees that waters of the U.S. are present on-site and submitted a Request for Appeal dated August 10, 2006.

Summary of Decision:

Appeal Evaluation, Findings and Instructions to the Detroit District Engineer (DE):

Appeal Reason 1: According to the Rapanos decision, this is no longer a water of the U.S.

Finding: This reason for appeal raises an issue that the District did not consider, but should. In addition to the appellant's reason for appeal, a second and unrelated issue was discovered during the evaluation of the District's administrative record. The District did not adequately document the presence of wetlands.

Action: The District's administrative record does not adequately address the two issues identified above and discussed below. The District shall prepare and include in the administrative record a decision document that supports its final JD in light of the Rapanos decision and adequately documents its basis for jurisdiction. The District shall complete these tasks within 45 days from the date of this decision, and upon completion, provide the Division office and appellant with its decision document and final JD.

Discussion: The appellant's stated reasons for appeal included: referrals to conversations between the appellant and representatives of the Ohio Environmental Protection Agency (OEPA); a description of the size of the property and how it was purchased and improved; and a statement indicating the absence of endangered plants and animals. The above do not meet the criteria for acceptable reasons for appeal and were not evaluated for merit.

The appellant's stated reasons for appeal also relay her understanding of how the Rapanos decision has impacted wetland regulations regarding her property. The appellant states that a representative of the OEPA informed her that the Rapanos decision has limited wetland jurisdiction for her property to the state of Ohio. This statement implies the District misapplied the law and was evaluated for merit.

The District's basis of jurisdiction states the presence of adjacent wetlands per 33 CFR 328.3(a)(7) and contains a short rationale:

The wetland on-site drains into a roadside ditch that carries flows west to Brandywine Creek, a tributary of the Cuyahoga River, a navigable water of the United States. This wetland totals 0.418 acre on site.

Rapanos

The Rapanos decision was published just days prior to the District's approved JD at issue in this appeal. Given the timing of these events, it is reasonable that the District did not have the opportunity to consider the Court's decision before making their approved JD. This is also evident by a lack of a discussion of the import of the Rapanos decision in the District's rationale for their approved JD. However, the Supreme Court's decision should be considered when determining whether the District has jurisdiction under Section 404 of the Clean Water Act (CWA). Therefore, this reason for appeal has merit and the District is instructed to reconsider their JD decision in light of the Rapanos decision.

Wetlands

The District's approved JD also verified the wetland delineation map submitted by the appellant. The map illustrates a wetland encompassing roughly half of the one acre property. In its rationale for decision, the District stated that the wetland delineation map provided by the appellant lacked a full report. Therefore, the District did not have the opportunity to review the data sheets or evaluation which the wetland delineation map was based upon and the administrative record lacked this supporting documentation.

Use of the 1987 Corps of Engineers Wetland Delineation Manual (1987 Manual) is mandatory to identify and delineate wetlands potentially subject to regulation under Section 404 of the CWA. In order to identify the presence of wetlands, the 1987 Manual (Part IV, Section D and Part IV, Section D, Subsection 2) requires that adequate information be collected or obtained to complete a routine data form. Data forms must provide adequate evidence that the site meets the three criteria for wetlands; hydrophytic vegetation, hydric soils, and wetland hydrology.

In some cases, information within the administrative record can suffice as a data point and not all data points must report specific conditions for each criteria. For instance, hydric soils can be assumed when an area has evidence of inundation or saturation, all vegetative layers are dominated by obligate species (OBL)¹, and the vegetation break is abrupt (Part IV, Section D, Subsection 1, Step 3).

In this case, the administrative record contains observations made by the District during its site inspection ("Site Notes" dated June 28, 2006). The District noted "almost all of the southern third of the site" contained marshy habitat, exhibited standing water, saturated soils and the presence of "cattails, Phragmites, rushes, and sedges." The District also documented the transition from emergent to scrub shrub vegetation as the land rises toward the north. Finally, the District reported that based on its review of local soil survey maps, there are two non-hydric soils types within the vicinity of the appellant's property.

Cattails (*Typha* sp.) are classified with a regional indicator of OBL, "Phragmites" or common reed (*Phragmites australis*) is classified with a regional indicator of FACW, and the regional indicators for "rushes" (*Juncus* sp.) and "sedges" (*Carex* sp.) are split between OBL and non-OBL classifications.

While it may be reasonable to assume that all three criteria have been met in the areas where cattails are the dominate vegetation and soils are inundated and saturated, the District's lack of soil data raises a reasonable doubt that the entire area delineated as wetland meets the wetland criteria established by the 1987 Manual.

For instance, when an area contains the presence of multiple vegetative layers and the break between vegetative types is gradual, the 1987 Manual (Part IV, Section D, Subsection 1, Step 4) requires that the soil criteria be considered. If soil maps indicate that the area may contain inclusions of other soil types (e.g. non-hydric), the soil type must be field verified in order to confirm the presence of hydric soils (Part IV, Section D, Subsection 1, Step 5). In this case, the

¹ The *National List of Plant Species That Occur in Wetlands: Northeast (Region 1)* (May 1988) ("The List") is the recognized federal standard for determining the "regional indicator" to plant species. Regional indicators are used to classify the likelihood of a species to occur in wetlands within a specific region. The state of Ohio is within region 1. Categories are: obligate wetland (OBL); facultative wetland (FACW); facultative (FAC); facultative upland (FACU); and obligate uplands (UPL). OBL almost always occur in wetlands, FACW species usually occur in wetlands, FAC species are equally likely to occur in wetlands or uplands, FACU usually occur in uplands and UPL almost always occur in uplands.

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District documented that the area exhibits a gradual transition between vegetative types and the presence of non-hydric soils within the vicinity of the project.

Thus, the District did not provide adequate evidence that the entire area delineated as wetlands meets the three criteria for wetlands: hydrophytic vegetation, hydric soils, and wetland hydrology. Therefore, the District's assertion that the site contained wetlands is unsupported and the District is directed to consider and address this deficiency upon remand.

Conclusion: For the reasons stated above, I conclude that this RFA has merit. The approved JD is remanded back to the District to include sufficient documentation to support its JD and to reconsider its JD decision as appropriate.

A handwritten signature in black ink, appearing to read "Michael G. Montone". The signature is fluid and cursive, with a large, stylized "M" and "G".

Michael G. Montone
Administrative Appeal Review Officer
Great Lakes and Ohio River Division